

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20054

In the Matter of	)	
	)	
Application by	)	
Qwest Communications International, Inc.	)	WC Docket No. 03-194
for Authorization to Provide In-Region,	)	
InterLATA Services in the State of	)	
Arizona	)	

**COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.**

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**COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.**

Sprint Communications Company L.P. opposes the above-captioned application of Qwest Communications International, Inc. for authorization to provide in-region, interLATA services in Arizona.<sup>1</sup> The public interest requires that Qwest's application be denied unless the Commission is convinced that the local markets have been opened fully and irreversibly to competitive entry. In Sprint's view, this is not yet the case.

**I. INTRODUCTION AND SUMMARY**

**A. Introduction**

A key purpose of the 1996 amendments to the Communications Act of 1934 (the Act) was to open the local market to competition. To that end, Congress envisioned three avenues of local entry: resale, use of incumbent LEC unbundled network elements and facilities-based competition; and it placed incumbent LECs in the rather unnatural role of

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<sup>1</sup>Application by Qwest Communications International Inc. for Authority to Provide In-Region, InterLATA Services in Arizona, WC Docket No. 03-194 (filed September 4, 2003) (Application).

assisting their would-be competitors by imposing the interconnection, resale, unbundling and collocation obligations of § 251(c).

To encourage the principal ILECs – the BOCs – to cooperate in this process, Congress enacted the “carrot” of § 271, giving the BOCs the right to enter the interLATA long distance market in-region once their local markets were truly open. The Commission recognized the importance of local market competition in one of the first applications it decided under this section.

Although Congress replaced the MFJ’s structural approach, Congress nonetheless acknowledged the principles underlying that approach that BOC entry into the long distance market would be anticompetitive unless the BOCs’ market power in the local market was first demonstrably eroded by eliminating barriers to local competition. \*\*\* In order to effectuate Congress’ intent, we must make certain that the BOCs have taken real, significant and irreversible steps to open their markets. We further note that Congress plainly realized that, in the absence of significant Commission rulemaking and enforcement, and incentives all directed at compelling incumbent LECs to share their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in local exchange and exchange access markets to any discernable degree.<sup>2</sup>

If the BOCs are allowed to enjoy the § 271 “carrot” before local competition is fully and irreversibly established, they will have little incentive to cooperate with competitive LECs thereafter, unless they are subject to continuing regulation. Successfully maintaining such a regulatory structure and adapting it to changes in technology will require significant on-going resources of both the Commission and interested parties, with, at best, uncertain results. It would be far preferable to withhold the § 271 “carrot” until local competition is sufficiently entrenched that competitive forces can supplant the intensive regulation and enforcement that otherwise would be required. Sprint does not

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<sup>2</sup> Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, 12 FCC Rcd 20543, ¶18 (1997) (Michigan Order).

believe that point has yet been reached in the state of Arizona for which Qwest is seeking § 271 authorization.

The public interest inquiry should focus on competition in the local market. In the decision of the Court of Appeals for the District of Columbia concerning the FCC's grant of SBC's 271 application for long distance service in Kansas and Oklahoma remanding the "price squeeze" issue,<sup>3</sup> the court commented on the Commission's inadequate consideration of the appellants' claim that the low volume of residential customers in these states and SBC's pricing which does not provide enough margin to make competition profitable are evidence of a "price squeeze" that is inconsistent with the public interest. The court stated: "Here, as the Act aims directly at stimulating competition, the public interest criterion may weigh more heavily towards addressing potential 'price squeeze.'" *Id.* at 555. Clearly, the court considers the Act's goal of "stimulating competition" to refer to competition in the local market, the market adversely affected by a "price squeeze." Thus, it is appropriate to consider whether the dismal state of competition and the low volume of residential customers served by facilities-based competitors is in the public interest when evaluating a § 271 application.

#### **B. Summary**

As shown below, the CLEC industry remains under financial pressure. The past few years have been marked by the collapse of several major CLECs and a severe tightening of capital to would-be entrants. Further, the regulatory environment remains in a state of uncertainty. Although the FCC released its Triennial Review Order on

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<sup>3</sup> Joint Application by SBC for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, 16 FCC Rcd 6237 (2001), remanded, Sprint Communications Co. L.P. v. FCC, 274 F. 3d 549 (DC Cir. 2001).

August 21, 2003, in which it addressed the availability of unbundled network element platforms (“UNE-Ps”), uncertainty will remain over its implications until the state commissions, which have been tasked with implementing much of the order, issue their decisions and the courts complete their reviews of the RBOCs’ appeals of the order. Thus, the rules which will apply to CLECs in the future remain unclear.

Further evidence of the dismal state of competition is the fact that the RBOCs have failed to establish themselves outside their territory. The low market shares for CLEC residential customers indicate that competition has not been firmly established. Finally, in its analysis of CLEC market shares, Qwest’s data appear to be inflated by the improper inclusion of data products and one-way lines.

## **II. THE CLEC INDUSTRY REMAINS UNDER FINANCIAL PRESSURE (PUBLIC INTEREST)**

The past three years have been marked by the bankruptcy of many of the CLECs that were in the vanguard of the industry. MCI, which claimed in 2002 to be the largest CLEC in the U.S. in addition to providing long distance services,<sup>4</sup> reported financial misrepresentations and was forced into bankruptcy in July 2002. The number of CLECs has decreased from approximately 330 at the end of 2000 to fewer than 80 in mid-2002.<sup>5</sup>

The bleak state of the industry is making it difficult for the surviving CLECs to obtain capital to expand their facilities. Given the current high risk associated with the CLEC industry, any financing that can be obtained comes at a high price. In the telecom

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<sup>4</sup> See Statement of Victoria D. Harker before the Subcommittee on Communications, Committee on Commerce, Science and Transportation, United States Senate, June 19, 2002.

<sup>5</sup> Yochi J. Dreazen, FCC’s Powell Says Telecom ‘Crisis’ May Allow a Bell to Buy WorldCom, The Wall Street Journal, A4 (July 15, 2002).

industry, capital spending decreased by 25 percent in 2001 and was expected to be another 20 percent lower in 2002. *Id.*

In addition to these financial hurdles, CLECs face continued regulatory uncertainty concerning the availability of UNEs. The FCC recently released its Triennial Review order in which it established criteria state regulators must apply to determine whether CLECs are impaired in the mass market without unbundled switching and mandated that states must make a fact-based decision based on FCC criteria within nine months. If the state determines there is no impairment, there would be a 27-month transition thereafter before such access is totally eliminated. The FCC also found that CLECs are not impaired without unbundled switching when serving businesses with high capacity loops, and state regulators will have 90 days to rebut this finding. The impact on the industry of the FCC's decision will not be known until it has been implemented by the states and court challenges are complete. Appeals of the order have already been filed in eleven federal appellate circuits, the RBOCs and USTA have filed writ of mandamus petitions at the D.C. Circuit, and requests for stay of portions of the order are pending as well. Until the cases are resolved, funding for an industry under severe financial pressure will remain scarce, and what is available will be high-priced.

At a minimum, until decisions are made concerning the availability of UNEs, the Commission must pay more attention to the market shares of the competition. It is highly unlikely that the percentage will increase at the same pace as it has in recent years, given the tumult recounted above. Indeed, it is more reasonable to expect that the market shares of competitors will shrink as the uncertainty about the availability and pricing of UNEs restricts further investments and sends additional competitors into bankruptcy.

### **III. OUT OF REGION RBOCs HAVE FAILED TO COMPETE AGAINST FELLOW RBOCs (PUBLIC INTEREST)**

ILECs have chosen not to compete with each other for customers outside their territories. Why would this be the case? ILECs not only know the local market, but they come equipped with the complex back-office systems needed to provide service efficiently and economically. It is telling, then, that despite earlier assertions to the contrary, the RBOCs have remained largely outside the local competition fray. If local competition were truly enabled, these RBOCs, who are high on the learning curve for the provision of local service, would have the incentive to enter the local markets outside their serving territories with bundles of local and long distance service.

In its order approving Verizon's Section 271 application for Rhode Island, the Commission found that the lack of entry by other carriers – either out-of-region RBOC or CLEC – can be explained by factors beyond the control of the applicant, “such as a weak economy, individual competing LEC and out-of-region BOC business plans, or poor business planning by potential competitors.”<sup>6</sup> This suggests that the Commission believes that the public interest considerations should only include factors within the control of the applicant. Sprint disagrees. In Sprint's view, consideration of the public interest should include all factors, whether or not they are within the applicant's control, that bear on whether the local market has indeed been irreversibly opened. The fact that the carriers which are best prepared to enter the local markets are not even attempting to

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<sup>6</sup> In the Matter of Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island, CC Docket No. 01-324, Memorandum Opinion and Order, released February 22, 2002, ¶ 106 (Rhode Island Order).



do so in any market outside their local territories is indicative of some deterrent to entry and should give the Commission pause as it considers whether or not local competition is fully and irreversibly enabled.

#### **IV. COMPETITION IN ARIZONA HAS NOT BEEN FIRMLY ESTABLISHED (PUBLIC INTEREST)**

As noted above, the Act allows competitors to enter the local market via three entry strategies: resale of the incumbent's network, the use of unbundled network elements, or interconnection to the incumbent's network by pure facilities-based providers, or some combination thereof. The Commission has found that all three means of entry should be available:

Congress did not explicitly or implicitly express a preference for one particular strategy, but rather sought to ensure that all procompetitive entry strategies are available. Our public interest analysis of a section 271 application, consequently, must include an assessment of whether all procompetitive entry strategies are available to new entrants.

Michigan 271 Order ¶387. In discussing how it would evaluate whether all strategies are available, the Commission made clear that there should be competition in each means of providing competitive local service and to both business and residential customers:

The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large).

Id. ¶391.

In its Rhode Island Order, the Commission stated that the public interest standard does not require it to "consider the market share of each entry strategy for each type of

service.” ¶ 104. However, the public interest standard does require that local competition be healthy and sufficient to endure after RBOC entry. Low levels of facilities-based competition, particularly in the residential market, should signal that competitors are unwilling or unable to make a sizeable investment in the market. If competition is not fully and irreversibly enabled in that market, the RBOC will retain its monopoly control over residential customers, and its entry into the long distance market will not serve the public interest.

Although Qwest claims that meaningful competition exists in Arizona, competition in the residential market is generally *de minimis*. In this application, Qwest estimates that as of May 31, 2003, the number of “Residential CLEC E-911 Listings” was 209,198<sup>7</sup> and the number of residential customers served by resale was 9,973.<sup>8</sup> Compared to the total Qwest residential lines of 1,797,926, these low quantities, which represent less than 11 percent of the residential lines in Qwest’s territory,<sup>9</sup> clearly indicate that competitors are not willing to make a sizeable investment in serving the residential market and that competition in this market has not been fully and irreversibly enabled.

CLEC competition, particularly in the residential market, is jeopardized by the precarious financial state of several competitors. As noted in Section II above, many CLECs have filed for bankruptcy, and capital for expansion is severely restricted and high-priced. Thus, CLECs will be unlikely to invest in residential services in the future, and their market share is unlikely to grow.

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<sup>7</sup> Application, Declaration of David L. Teitzel, “State of Local Exchange Competition Track A and Public Interest Requirements,” p. 13.

<sup>8</sup> *Id.*, p. 19.

<sup>9</sup> Qwest estimates 209,109 Residential CLEC lines using the E-911 listings method plus 9,973 Resold Access Lines (*Id.*, p. 13) represent 10.86 percent of Qwest’s 1,797,926 residential lines (p. 22) plus CLEC lines.

The Commission has repeatedly stated that “factors beyond the control of the BOC, such as individual competitive LEC entry strategies, can explain low levels of residential competition.”<sup>10</sup> However, small CLEC residential market shares are the norm, not the exception. Clearly, the reluctance of CLECs across the nation to enter the residential market is evidence of a widespread, systemic problem with the development of residential competition which cannot be explained away by “competitive LEC entry strategies.” Rather, the miniscule market shares indicate that factors within the BOCs’ control are preventing the full and irreversible entry of CLECs into the residential market.

**V. QWEST’S ESTIMATION OF COMPETITIVE LINES INCLUDES DATA PRODUCTS AND ONE-WAY LINES WHICH ARE IRRELEVANT TO THE PUBLIC INTEREST ANALYSIS AND ARE OTHERWISE IMPROPERLY INFLATED (PUBLIC INTEREST)**

In support of its public interest argument, Qwest estimates the percentage of local competition in Arizona. Sprint believes that Qwest’s methodology improperly inflates the CLECs’ line estimates by including CLECs’ high speed data lines and local lines which are not used for competitive local service and by attributing too many lines to competitors based on local interconnection service (“LIS”) trunk data.

As of the date of this Application, Sprint had offered local telephone service in Arizona for only a few months. Nevertheless, Qwest identifies Sprint as having the sixth largest number of the total LIS trunks in service. Qwest also reports Sprint has having no E-911 records, no Facilities-Based CLEC White Page Listings, and no UNE-Platform

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<sup>10</sup> See, e.g., *Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, Memorandum Opinion and Order, FCC 02-189, at para. 168 (rel. June 24, 2002).

telephone numbers in service.<sup>11</sup> This discrepancy between Sprint's LIS line count and the lack of other corroborative evidence that Sprint is providing CLEC service in Arizona is due to the fact that Sprint uses its LIS trunks primarily for its Dial IP service, which is not the relevant market. Sprint suspects that most of the facilities are actually one-way Dial IP lines used to access IP providers and some DSL lines. While Dial IP and DSL are niche markets that Sprint values highly, they are not substitutes for local exchange service, the market over which Qwest retains control and which is the market at issue here.

To the extent that the market share information provided by Qwest reflects data services, it improperly overstates the relevant CLEC market share. For other carriers, Qwest does not know how they use their interconnection trunks, and it should not be permitted to rely on estimates based on such trunks to demonstrate entry into the local exchange market.

Because Sprint had only recently entered the Arizona local telephone exchange market on the date of the Application, most of the access lines attributed to Sprint should be removed from Mr. Teitzel's competitive analysis. Sprint cannot know what the true market share of competitive carriers is in Arizona; however, Qwest's misuse of Sprint data certainly supports an inference that Qwest has similarly misused data relating to other competitive carriers as well.

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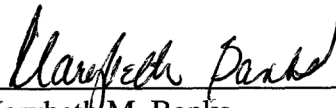
<sup>11</sup> Exhibit DLT-TRACK A/PI-AZ-1, p. 4.

## VI. CONCLUSION

Because Qwest has failed to demonstrate that there is meaningful competition in Arizona, its application for § 271 relief should be denied.

Respectfully submitted,

Sprint Communications Company L.P.

A handwritten signature in cursive script, appearing to read "Marybeth M. Banks", is written over a horizontal line.

Marybeth M. Banks

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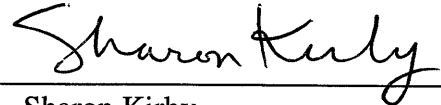
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September 24, 2003

### CERTIFICATE OF SERVICE

I hereby certify that a copy of Sprint's Comments in the Matter of Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona, WC Docket No. 03-194, was sent electronically and/or by U.S. First Class Mail on this 24th day of September 2003 to the parties listed below.



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